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## European Analogues to the Class Action: Group Action in France and Germany

William B. Fisch

*University of Missouri School of Law*, [fischw@missouri.edu](mailto:fischw@missouri.edu)

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## European Analogues to the Class Action: Group Action in France and Germany<sup>1</sup>

For the civil proceduralist in the United States the most perplexing problems of recent years have been presented by claims of large numbers of persons against large economic interests. A single error in manufacturing design can cause a relatively small injury to each of a large number of consumers; a misrepresentation in national advertising for such goods can have similar consequences; the polluting effects of a single enterprise can be dispersed among a large neighboring population. The result is that the stake of each potential claimant in the outcome of the litigation can be greatly outweighed by the magnitude of the wrongdoer's total potential exposure and by the expenses of litigating the substantive issues.

When the government involves itself in such problems, through legislative and administrative decisions attempting to regulate the risk-creating activities, the procedural issue may be whether persons other than those directly regulated should be permitted to take the initiative in bringing matters to court, to by-pass or force the hand of an erring or reluctant enforcement agency.

A major underlying theme, no doubt, is the complex of interlocking relationships between individuals, groups of persons similarly situated and governments, competing in a sense for the right to pursue persons or enterprises who have violated the law and inflicted injury. Even more than in other areas of procedure, the allocation of responsibility and opportunity for bringing wrongdoers to court is closely bound up with substantive policy. It is clear for example that restrictive attitudes toward procedural devices such as class actions, when expressed in a specific case, may well reflect ambivalence toward the underlying norms, sympathy with the wrongdoer, unwillingness to impose unduly drastic consequences on a particular wrongdoer where others are perceived as getting by, or

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WILLIAM B. FISCH is Isador Loeb Professor of Law, University of Missouri-Columbia, School of Law.

1. Revised version of a paper prepared for a comparative civil procedure symposium at the 1976 meeting of the Association of American Law Schools. Portions of the research and writing for this article were done with the support of a grant from the University of Missouri-Columbia Law School Foundation, for which I express my gratitude. All translations in this article are mine.

simply the conclusion that the courts are not suitable instruments for the solution of certain problems.<sup>2</sup>

Other advanced industrialized nations have faced the same problems, and comparative study in this area has been active in recent years. In 1973, the German Society for the Comparative Study of Law held a symposium on "Private Suits in the Public Interest," to which Professors Adolf Homburger of Buffalo and Hein Kötz of Konstanz contributed papers of impressive insight and scholarship.<sup>3</sup> In 1974 one of the topics for the 9th International Congress of Comparative Law at Teheran was the "The Role of the Ministère Public in Civil Proceedings," for which Professor Mauro Cappelletti of Florence and Stanford wrote the general report and later published an expanded version.<sup>4</sup> Professor Cappelletti is conducting a longterm study on access to justice, in which the judicial handling of "diffuse" or "meta-individual" interests has received specific comparative analysis.<sup>5</sup>

In this comparative work, as in much of the American literature on domestic problems, there is a strong tendency to concentrate on the "public interest," as if the principal issue were the extent to which private initiative can be harnessed to the general welfare as a supplement to more usual governmental resources. It is thereby properly recognized that "massification"<sup>6</sup> has made the individualistic premises of traditional litigation forms obsolete. The irony of such titles as "private suits in the public interest," however, is precisely the invocation of the outdated dichotomy between public interest, ordinarily represented by government, and the purely private.

What is involved, in fact, is an entire spectrum of group situations, ranging from material injury to many specific and identifiable persons (mass accident, consumer fraud, pollution of a specific body of water) to essentially non-material offense against general moral sensibilities (pornography, prostitution). The violator may be an individual, an enterprise or an agency of the government itself. The common procedural issue is whether the entire group affected can be brought into the litigation. In general, the more "diffuse" and non-material the interest sought to be vindicated, the greater the would-be champion's difficulty in establishing the right to sue.

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2. See e.g., Judge Medina's opinion in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018f. (2d Cir. 1973).

3. Homburger & Kötz, *Klagen Privater im öffentlichen Interesse* (1975); Homburger, "Private Suits in the Public Interest in the United States of America," 23 *Buffalo L. Rev.* 343 (1974).

4. Cappelletti, "Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study," 73 *Mich. L. Rev.* 800 (1975).

5. Cappelletti, "Vindicating the Public Interest Through the Courts: A Comparative View," 25 *Buffalo L. Rev.* 643 (1976).

6. *Id.* at pp. 645f.

I propose in this article to examine the group action phenomenon in France and Germany. I shall adopt the perspective of a fairly typical American class-action plaintiff: an individual whose *private* interests suggest litigation, but who is or may be discouraged from going it alone by costs of litigation and the strength of the opposing forces. The question is the extent to which the individual can mobilize others who share his fate, either to share the burden of litigation or to add weight to the claim.

The frequency with which this strategy will be considered in a given system will obviously be affected by structural factors, among the most important of which are the costliness of litigation generally and the availability of alternative forms of assistance to the individual litigant. It may be assumed for present purposes that to the extent the system provides effective forms of direct assistance—legal expense insurance, group legal services, small claims courts, legal aid, direct intervention of the state—it will seem less desirable to the individual to try to mobilize group action. It is impossible in this article to give more than a hint of these aspects of the systems under study; nonetheless it seems appropriate to begin with some reference to a few of them in the French and German procedural systems.

## I. SOME BASIC NOTIONS<sup>7</sup>

### A) *Civil, Criminal or Administrative Courts*

For the American lawyer, the questions we are dealing with here belong to *civil* procedure, with some added twists where administrative decisions are involved. Moreover, except for the very real complication of choosing between state and federal courts, we usually think of a single set of courts in a given jurisdiction. The private claimant is effectively excluded from the criminal process in our country, due to the entrenched doctrine of prosecutorial discretion; and review of administrative decisions is usually handled by the regular courts.

In Europe, on the other hand, and especially in France, there are typically three entirely separate procedural systems involved in these questions: civil, criminal and administrative, connected at the top by some mechanism for deciding jurisdictional conflicts. One of the strong features of these systems (as we will see, France shows it much more than Germany) is a significant overlap of function with respect to private claims, in that a person injured by a reason of a violation of a penal law may have the option of pursuing his claim in

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7. Many of us who teach general comparative law courses are accustomed to referring our students to Professor Comparovich of Ruritania in order to smooth their procedural Edges—please forgive, Professor Schlesinger, *Comparative Law* 269f., esp. 275-82 (3rd ed. 1970).

conjunction with the criminal prosecution,<sup>8</sup> and in that private claims against the government may be pursued in administrative courts.

### B) *Costs and Attorneys' Fees in Civil Cases*

Another fundamental point of comparison between the systems we are considering—perhaps the most fundamental one in this area—concerns the handling of major litigation costs. Since to a large extent the issues of standing to litigate and the suitability of representative forms of action become contested issues precisely because of the costliness of modern lawsuits, the way in which the system allocates the major cost items can determine the strength of the felt need for alternatives to the archetypical two-party lawsuit.

(1) *Attorneys' fees as taxable costs.* In all three systems, the loser must normally pay the winner's *court* costs; but should that include attorneys' fees? The American rule excluding them, pocked with statutory and judicial exceptions<sup>9</sup> but ringingly affirmed in principle by the Supreme Court in *Alyeska Pipeline Serv. Co. v. Wilderness Society*,<sup>10</sup> finds few adherents abroad. In Germany they are normally included—not, to be sure, what is actually agreed between lawyer and client, but rather an amount fixed by the law, usually in terms of a percentage of, or as a function of, the amount in controversy.<sup>11</sup> While it is permissible at least in Germany for a client to agree in writing to a higher fee than that prescribed by the statutory schedule,<sup>12</sup> it is likely that in most instances the schedule will prevail, and therefore the cost indemnity will be effective.<sup>13</sup>

8. See the overview in Jolowicz, *Procedural Questions* pp. 4-15, in *Intern. Encycl. Comp. L.* XI (Torts) ch. 13 (1970).

9. See e.g., Note, "Attorney Fees: Exceptions to the American Rule," 25 *Drake L. Rev.* 717 (1976).

10. 421 U.S. 240 (1975). Of the flood of print on this case see e.g., Cedar, "Defrosting the Alyeska Chill: The Future of Attorneys' Fees Awards in Environmental Litigation," 5 *Environmental Affairs* 297 (1976). Some states have taken a contrary view, sustaining awards on the so-called "private attorney general" theory at least in limited circumstances; see e.g., *Serrano v. Priest*, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977).

11. See *Bundesgebührenordnung für Rechtsanwälte* (BRAGebO), Anlage zu § 11. The law of costs is currently the subject of heated debate. In 1975 the government, the Bundestag (lower house) and Bundesrat (upper house) were unable to agree on a revision of the general fee scale, though all agreed that an increase in fee levels was indicated. See Baumgärtel, "Kostenexplosion im Bereich des Rechtsschutzes?," 1975 *BB* 678-9. In September 1976, the 51st Assembly of German Lawyers (*Juristentag*) agreed without dissent that changes were needed in the law of costs, and made a number of recommendations. See 1976 *NJW* 2004.

12. BRAGebO § 3.

13. It is very tempting to speculate on the effect of this difference, but clear factual conclusions are not to be expected. Cf. Cedar, *supra* n. 10 at 302f. On the face of it, one would have to assume that the American rule would discourage meritorious claims, because of the substantial residual cost of vindication, and would encourage nuisance suits, because of the pressure to settle produced by the residual costs to the

In France, on the other hand, the picture is mixed. Under the prior law, only the statutorily regulated fees for the written work of the *avoué* were included in taxable costs, while the potentially much larger honoraria of the *avocat* were excluded as a gratuity; despite the substantial merger of the two professions in 1972, this distinction of functions still persists for cost purposes.<sup>14</sup> However the new Code of Civil Procedure of 1975 contains the following provision, as amended in 1976:

Where it appears inequitable to leave a party with the expenses incurred by it which are not included in taxable costs, the judge may require the other party to pay it such amount as he determines.<sup>15</sup>

While much will depend on the manner in which the provision is administered by the courts, it is regarded as a significant reform.<sup>16</sup>

2) *The contingent fee.* Despite the fact that the losing party does not bear the burden of the winner's attorney's fees, it is still thought appropriate in this country to provide a means of relieving a claimant from the risk of having to pay his *own* attorney when he loses. For the moment, in civil cases, our most common answer to

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defendant. On the other hand, the German rule would discourage questionable claims because of the increased cost of failure. That this common sense assumption is often shared by American lawmakers can be deduced from the frequency with which attorney's fees for successful claimants are expressly provided for when it is thought desirable to encourage private litigation, usually without a corresponding obligation for the unsuccessful claimant. See Note, *supra* n. 9 at 717-719. On the other hand, it is legitimate to wonder whether the statutory fee scales which accompany the German rule would have a depressing effect on the imagination and enterprise of the lawyer, and also to ask whether the greatest risk should be placed on the loser precisely when—judging from the fact of full, all-out litigation—the outcome is most uncertain. Cf. Kaplan, "An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure," 69 *Mich. L. Rev.* 821, 835-6 (1971).

14. The current taxable cost rule is contained in (New) Code of Civil Procedure Art. 695, Decree No. 75-1123, 5 Dec. 1975, *Juris-Classeur Périodique (Semaine Juridique)* (J.C.P.) 1975, Suppl. to No. 52. This provision covers remuneration of *avocats* (the old honorarium, traditionally excluded as "gratuity") "to the extent that it is regulated." While it appears that a fee scale for the *avocat* function was contemplated in conjunction with the 1972 reform, none has materialized, and the old *avocats* resist it for the same reason that American lawyers would resist the idea of a statutory fee scale generally. See for general discussion including the fee problem, Herzog & Herzog, "The Reform of the Legal Professions and of Legal Aid in France," 22 *Int. & Comp. L. Q.* 462 (1973); Ancel, "Some Recent Reforms in the French Legal Profession," 18 *Jur. Rev. (N.S.)* 209 (1973). On the pre-reform law see Herzog, *Civil Procedure in France* 536-7 (1967).

15. Decree No. 76-714, art. 5, of 29 July 1976, J.C.P. 1976. III. 44619, modifying art. 700 of the New Code of Civil Procedure.

16. See Boccara, "La Condamnation aux Honoraires (Article 700 du Nouveau Code de Procédure Civile)," J.C.P. 1976 I. 2828. One writer has found support in recent unpublished decisions of courts of appeals for the proposition that it is normally equitable to impose additional fees and expenses on a party from whose act the litigation arose (negligence, breach of contract, etc.): Loyer-Larher, "L'Article 700 du nouveau code de procédure civile et le remboursement des frais non compris dans les dépens," D.S. 1977. Chron. 205, 208-9.

this problem is the contingent fee, which in effect allows the attorney to assume the risk of losing. Most other countries, including France, Germany and England, consider the contingent fee to be unethical, because it destroys the professional independence of the attorney.<sup>17</sup>

3) *Legal aid in civil cases.* It is also part of the tradition in both France and Germany to provide legal aid to civil litigants who cannot afford even provisionally to absorb costs and fees. In both systems there has been dissatisfaction. In France, prior to the great reform of the legal professions in 1971-72, the appointment of the lawyer to a legal aid case operated very much like the contingent fee in its negative aspect, in that the attorney did not get paid if the client lost;<sup>18</sup> under the new law an "indemnity" is provided by the state in such cases, which in turn is substantially lower than the normal fee.<sup>19</sup> In Germany the attorney appointed in a legal aid case has long received compensation from the state, but also at reduced rates; the entire system is now being debated, and the one proposition that the lawyers can agree on with virtual unanimity is that reforms of the cost and legal aid systems must not come at the expense of the lawyers.<sup>20</sup> So far as I am aware there are no fixed legal aid offices with salaried staff lawyers for civil litigation in either system. However, despite the difficulties for the lawyers attendant on differentiating financially between legal aid clients and regular clients, it does appear that public assistance in civil cases is more readily available in Europe than in the U.S.<sup>21</sup>

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17. See Schlesinger, *Comparative Law* 275-6, 478-85 (3d ed. 1970). It is worth noting, of course, that there is a trend toward the regulation of the contingent fee, either generally [New Jersey Sup. Ct. Rule 1:21-7(c) (1972)] or with respect to specific types of actions [Calif. Bus. & Prof. Code § 6146 (1975) on medical malpractice claims].

18. See Herzog, *Civil Procedure in France* 549 (1967).

19. See Herzog & Herzog, *supra* n. 14 at 486-7. The conditions of eligibility for legal aid are in simple terms of monthly income, the maximum amounts being fixed in the annual budget; the most recent budget law L. No. 77-1467 art. 96, D.S. 1978 L. 39 fixes the income ceiling at 1620 F. for full aid, and 2700 F. for partial aid (the exchange rate now being between 20 and 25 cents to the franc).

20. In September 1976, the Assembly of German Lawyers approved the following resolution by a vote of 152-5, 8 abstaining: "The lawyer should receive a full fee in litigation-aid cases." 1976 *NJW* 2007, resolution I. 14. The discussion includes extra-judicial aid as well, see Blankenburg, "Rechtsberatung als Hilfe und als Barriere auf dem Weg zum Recht," 1976 *Z. Rechtspolitik* 93; Redeker, "Zur Stellung der Anwaltschaft im aussergerichtlichen Rechtsberatungssystem," *id.* at 97; generally Baur, "Kostenrecht-Armenrecht," 1976 *NJW* 1380; Gottwald, "Armenrecht in Westeuropa und die Reform des deutschen Rechts," *Z. Zivilprozess (ZZP)* 89, 136 (1976).

21. See e.g., Cappelletti, "Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe," 69 *Mich. L. Rev.* 847, 870f. (1971).

## II. CLASS AND GROUP ACTION IN THE UNITED STATES

### A) *Salient Features of the Class Action*

It is not my purpose to rehearse the problems of the class action here, for they are or should be painfully familiar. Indeed, the class action as hot topic has recently received the ultimate compliments: a proposed Uniform Class Action Act<sup>22</sup> and a Harvard Law Review *Developments* note.<sup>23</sup> It is appropriate however to call attention to those features of the class action which distinguish it from other procedural devices.

(1) The class action is a *representative* action, whereby one or more *members* of the class litigate on behalf of all the members; as we shall see, representative actions are not unknown in France and Germany, though they appear in somewhat different form.

(2) The litigation is typically commenced on the *individual initiative* of the representative member, who bears the initial and in many cases the ultimate burden of costs; again, in a somewhat different form this is also possible in France and Germany.

(3) Particularly with respect to mass claims, the representative is usually *self-appointed* in the true sense, without the benefit of any pre-existing relationship among the members, based solely on the fact of their common fate at the hands of the wrongdoer; it is this feature which is most difficult to find reflected in European devices.<sup>24</sup>

The principal procedural purpose to be filled by the representative action is economy: on the one hand, to enable courts to adjudicate many claims and/or deal with many claimants in a single lawsuit without unnecessary duplication of proof; and on the other hand, to enable claimants to spread the costs of litigation. The major problems on which opponents have focused are, of course, also economic: on the one hand, the class action may increase the burden on the courts, if it can be assumed that without it there would not in fact be many separate lawsuits; and on the other, it may make litigation so expensive for the *defendant* that meritorious defenses will be foregone in favor of pretrial settlement. It is clear that the desirability of imposing such burdens on courts and defendants—and obviously not all class actions will involve undue burdens—must be related to the strength of the policy underlying the norms which the lawsuit seeks to enforce.<sup>25</sup>

22. 12 U.L.A. (Master Ed.). Supplement 1977 at pp. 10f.

23. "Developments in the Law—Class Actions," 89 *Harv. L. Rev.* 1319-1644 (1976).

24. It is, of course, this feature which has created the most difficulty for us, by making it so important for the court to evaluate the suitability of the class representative to function as such; without it (or rather with assurance of pre-existing relationship) it can be supposed that the problems of notice and opportunity to be heard would loom much less large.

25. This is, I take it, the burden of the Harvard Law Review's "substantive theory



Perhaps the aspect of the American class action for damages which is the most notable to European eyes is the role of the lawyer in developing, managing, and often financing the lawsuit. The permissibility both of the contingent fee and advancement of litigation expenses makes many class actions in effect lawyers' enterprises, in which the stake of the attorney is far greater than that of any of his clients, and in which the attorneys' fee may reach unseemly levels.<sup>26</sup> When it is asked whether this or that country should adopt the class action as a procedural device, the answer will quickly turn on whether or not the class action will work without the contingent fee.<sup>27</sup> Here it is easy to forget that in most class actions for damages, any fee to be collected out of the proceeds of victory must be approved by the court so that there is some opportunity to hold the fee down to an acceptable level. Moreover, the contingent fee works only in damages cases, not in injunctive relief cases which do not produce monetary recovery for the clients.<sup>28</sup>

The contingent fee controversy does illustrate a major weakness of the class action device, as currently conceived, as a method of facilitating access to the courts for mass claims: it does not automatically provide a means of sustaining the running costs of litigation pending final judgment. So long as the resources of the absent members of the class<sup>29</sup> and the opponent<sup>30</sup> remain protected, the

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of class action": that cost-burden arguments are inadequate to justify keeping or eliminating class actions, because they are inconclusive bases for generalization; rather, the Review says, the principal value of the class action is to enable the court to see and understand the full range of interests involved in a given dispute, so as better to implement substantive policies. Note, *supra* n. 23 at 1353-72.

26. See Kötz, "Klagen Privater im öffentlichen Interesse," in Homburger & Kötz, *supra* n. 3 at 84-7. If we assume that the plaintiff's contingent fee would run to 1/3 by contract, and probably 15-25% in court-approved class actions cases, the contrast with the German situation is interesting. In 1958 Professors Kaplan, von Mehren & Schaefer estimated that the *total* cost burden on the loser, including attorney's fees, for *both sides*, would run about 7.1% for a \$25,000 case (then current exchange rates, 100,000 DM): "Phases of German Civil Procedure," 71 *Harv. L. Rev.* 1193, 1465 (1958). More recently it has been estimated that the rules now in effect would result in a total taxable cost burden of about 19.2%: Baumgärtel, "Kostenexplosion im Bereich des Rechtsschutzes?", 1975 *BB* 675.

27. See comments by Schricker, in Homburger & Kötz, *id.* at 103-4. For the view that the contingent fee is not an essential passenger in the transplantation of the class action, see Koch, *Kollektiver Rechtsschutz Im Zivilprozess* 95-6 (1976).

28. See ABA Code of Professional Responsibility EC 2-20 (1969).

29. The general proposition that absent members of a class, not being formal parties to the litigation, are entitled to a "free ride" has been qualified to the extent of permitting discovery of relevant information from them, *Brennan v. Midwestern Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), but this is an exceptional situation, *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974). See Federal Judicial Center, *Manual for Complex Litigation* 50 (1977); Wright & Miller, *Federal Practice and Procedure* § 1787 (1972). Even non-binding solicitations of assistance from absentees after the class action has been certified, while probably permissible, are subjected in the federal courts to prior judicial authorization, see *Manual for Complex Litigation* 27f; ABA Committee on Ethics and Professional Responsibility, *Informal Opinion* 1326 (1975).

representative's financial commitment is increased rather than mitigated by choosing the class action. In effect, therefore, the device presupposes the existence of a representative capable of financing the litigation and willing to risk total loss of the investment.

*B) Pre-existing Associations and Groups as Claimants: Standing*

It is also not consistent with the purpose of this paper to review the great American debates over the law of standing, and in particular the standing of groups and associations to challenge governmental action.<sup>31</sup> I believe that experience since *Sierra Club v. Morton*<sup>32</sup> has shown that groups like the Sierra Club and other environmental organizations, or Ralph Nader's various consumer troupes, have had no difficulty in gaining access to the courts so long as their membership included some persons who were intended to be protected by the laws invoked and whose interests are or would be adversely affected by the action challenged.

On the other hand, it is the clear lesson of *Sierra Club* that a group must show at least that much individualized injury in fact; the Supreme Court has never authorized the purely ideological action to review administrative acts. The recent standing decisions in what Cappelletti has called the Court's "crusade against public interest litigation"<sup>33</sup> all involve determinations that no member of the group suing could *individually* satisfy the standing requirements.<sup>34</sup> In relation to our specific theme of group action as an alternative to individual action, therefore, the case law on standing in the U.S. may properly be characterized as liberal.

In most such actions, of course, no damages are sought for the group, but rather injunctive or declaratory relief. In effect, the group is a source of initiative and financing, which does not accomplish more than a comparably financed and motivated individual could do alone, unless it is by means of a greater credibility.

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30. The Supreme Court's view that the representative plaintiff, rather than the defendant, should bear the cost of sending notice to absentees [*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)] has now been extended to discovery related to notice in *Oppenheimer Fund, Inc. v. Sanders*, 98 S. Ct. 391 (1978).

31. See the discussion by Homburger, *supra* n. 3 at 385f., useful precisely because it was prepared for an audience of comparatists trained principally in other systems.

32. 405 U.S. 727 (1972). See also *U.S. v. SCRAP*, 412 U.S. 669 (1973).

33. Cappelletti, *supra* n. 5 at 650.

34. E.g., *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (poor person denied free service at hospital); *Warth v. Seldin*, 422 U.S. 490 (1975) (low-income minority person denied low-income housing in a suburb by reason of zoning ordinance excluding such housing); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (criminal defendant alleging that the bail and sentence system in particular magistrate court was discriminatory). On the standing issue, criticizing the Court's recent decisions principally on the ground that they confuse the merits with the right to sue, see Tushnet, "The New Law of Standing: A Plea for Abandonment," 62 *Corn. L. Rev.* 663 (1977).

## III. FRANCE

A) *Mass Claims*

## 1) Action Civile

a) *In general*<sup>35</sup>

The French law has for a long time provided for two actions in response to a violation of criminal law: the public action (by the state, for the imposition of penal sanction), and the private action (by the victim, for damages or other civil relief). The basic rules governing the availability of the private action (*action civile*) are now embodied in arts. 1-10 of the 1957 Code of Criminal Procedure (c.p.p.).

The private action is available for any violation (art. 2),<sup>36</sup> and may be brought by anyone who personally suffers damage directly caused by such violation. It may be brought either in a criminal court in conjunction with the public action (art. 3) or separately in a civil court (art. 4). All damage resulting from the infraction is recoverable, whether material or non-material (art. 3). Except for limitations periods, the substantive rules of the civil code govern the private action (art. 10), but where the private action is brought in criminal court, the rules of criminal procedure apply.<sup>37</sup>

Art. 3. c.p.p. and its predecessors have been understood to mean that the private action before a criminal court may only be brought in conjunction with the public action,<sup>38</sup> and that the court must render judgment on both actions at the same time (so-called "rule of solidarity of actions").<sup>39</sup> Since the law also provides that the public action may be initiated by the injured party (art. 1), the courts have held since the beginning of the century that institution of the private action automatically sets the public action in motion, whether or not the prosecuting authorities find cause to proceed.<sup>40</sup>

35. See the overview in Larguier, "The Civil Action for Damages in French Criminal Procedure," 39 *Tul. L. Rev.* 687 (1965).

36. Certain violations deemed to involve exclusively the public interest, such as tax claims, are excluded by caselaw, see Jolowicz, *supra* n. 8 at p. 6.

37. *Encyclopedie Dalloz*, Action Civile ¶ 545 (1974).

38. See Bouzat et Pinatel, 2 *Traité de Droit Pénale et de Criminologie* ¶ 983 (1970).

39. *Encyclopedie Dalloz*, Action Civile ¶¶ 556-571 (1974).

40. Bouzat et Pinatel, *supra* n. 38 ¶ 986. The French prosecutor is given a certain degree of discretion in determining whether or not to prosecute, c.p.p. art. 40, see Bouzat et Pinatel ¶ 972.

It used to be thought that acquittal on the criminal charge would require dismissal of the *action civile* for lack of competence, but in 1976, the Criminal Chamber of the Court of Cassation held that the trial court must render judgment on the merits against the *partie civile* in such a case (Cass. Crim. 5 May 1976; Rec. Dalloz-S. 1976, 494). In the specific case of felonies (*crimes*) however, cognizable only in the Assize Court, c.p.p. art. 372 expressly authorizes judgment in favor of a *partie civile* for *faute* (civil fault) involved in the conduct prosecuted, even when the defendant is acquitted of the criminal charge. If the new position of the Criminal Chamber holds, the pri-

If the private action is brought in a civil court, and no public action in the criminal courts is pending, the private action proceeds simply as an ordinary civil action. If a public action is pending, the civil court must suspend judgment until the public action is disposed of (art. 4). In either case, the private action is time-barred simultaneously with the public (art. 10), so long as the private claim is based directly on the violation of penal law.<sup>41</sup>

b) *Advantages of the Action Civile: Costs*

It appears that the subject of costs in private actions before criminal courts is still somewhat uncertain. It is clear, at least, that a private claimant who wins is entitled to full reimbursement of costs; and that if the defendant is unable to pay, the state bears the costs.<sup>42</sup> Apparently this also applies where the defendant is convicted, but the victim is found contributorily at fault (resulting in apportionment of damages) or the amount of damages is reduced on appeal.<sup>43</sup>

If the defendant is acquitted or if the private claimant loses on some other ground, the latter bears the costs both of prosecution and defense; but in any case the court may by express order relieve the private party of this liability, on a showing of good faith (arts. 375, 475, c.p.p.). This power seems to have been utilized with some liberality.<sup>44</sup>

The principal cost advantage of the *action civile* over the normal civil lawsuit, then, lies in reducing the risk of having to pay the defendant's costs.

c) *Advantages of the Action Civile: Criminal Procedure*

Beyond doubt the main advantage to be gained by the private claimant in the *action civile* is the benefit of the inquisitorial procedure of the French criminal courts. Once the public action is triggered by the private action, it becomes the responsibility of the *juge d'instruction* to proceed with an investigation, in which he is not inevitably dependent on the prosecutor or the private claimant, but may invoke the full investigatory powers of the police.<sup>45</sup> The process is faster and more efficient than the ordinary civil action, in

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vate claimant in the case of lesser crimes would run the risk of losing the civil claim altogether by *res judicata* for failure to prove all the elements of the crime.

41. Bouzat et Pinatel, *supra* n. 38 ¶ 1075.

42. *Id.* ¶ 1451(B); c.p.p. arts. 375 (*crimes*), 475 (*delits*).

43. *Encyclopedie Dalloz*, Action Civile ¶ 527 (1974); Bouzat et Pinatel ¶ 1451.

44. Bouzat et Pinatel, *id.*

45. *Encyclopedie Dalloz*, Action Civile ¶ 13 (1974); Larguier, n. 35 *supra*, at 687. On the diminishing investigative role of the *juge d'instruction* vis-à-vis the prosecutor in France generally, see Goldstein & Marcus, "The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany," 87 *Yale L.J.* 240, 250-6 (1977).

which the judge relies much more heavily on the parties to supply information, and yet little power is given to the parties to obtain information from each other.<sup>46</sup>

d) *Role of Groups and Associations*

When we return to our motif of the mass claim, we find that much debate has occurred in France over the proper role of associations as claimants in the *action civile*. For the moment, it appears that this role is viewed with favor by the national assembly but not by the courts. The problem is the familiar one of standing.

i) *In General.* The basic requirements for the *action civile* are set forth in art. 2, para. 1, of the c.p.p.:

The private action for reparation of injury caused by a *crime, délit, or contravention* belongs to anyone who has personally suffered injury directly caused by the violation.

Because of the requirement that the injury be suffered *personally* and *directly*, there is considerable debate on the standing of an association or other group to pursue the action on the basis of injury to its members as such. In particular, the civil and criminal chambers of the Court of Cassation appear to have taken divergent approaches, the latter consistently hostile, the former more hospitable to the group action.<sup>47</sup>

The most widely acknowledged breakthrough was a decision of the Combined Chambers of the Court of Cassation in 1913, in which the Union of French Winegrowers sought to intervene as *partie civile* in the prosecution of a person charged with diluting wine with water.<sup>48</sup> The court held that the Union, created under an 1884 law permitting formation of unions or trade associations in commerce, industry and agriculture, had standing to litigate for the collective interests of the trade or profession it represented. This right was codified in 1920 and extended to the free professions, and it now appears as art. 411-1 of the new Labor Code:

Trade unions may exercise, before all jurisdictions, all rights reserved to the *partie civile* in relation to acts which directly or indirectly prejudice the collective interests of the trades which they represent.

Under this provision union actions have been rejected because the interests affected by the wrong were not those of the trade or profes-

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46. It may be that the procedure under the new Code of Civil Procedure of 1975 will be a substantial improvement in efficiency; on the fate of earlier attempts see Herzog, *Civil Procedure in France* 375 (1967).

47. Audinet, "La Protection Judiciaire des Fins poursuivies par les Associations," 1955 *Rev. Trim.* 213, 216f; *Encyclopedie Dalloz*, *Action Civile* ¶¶ 283-4 (1974); Bouzat et Pinatel ¶¶ 1010f.; Solus et Perrot, 1 *Droit Judiciaire Privé* 228-9 (1960).

48. Chambres Réunies, 5 April 1913, D.P. 1914.1.65, S. 1920.1.49.

sion as such, but those of the public at large,<sup>49</sup> or—as in the case of a non-work-related assault on a member—those of an individual member in a capacity other than membership in the trade.<sup>50</sup> On the other hand, a union has been allowed to pursue violations of the labor laws (hours, working conditions, wages, etc.) even where the immediate victim was not a member of the union, because the collective interests of the trade are indirectly affected.<sup>51</sup>

In 1923, the Combined Chamber of the Court of Cassation purported to distinguish between unions and trade associations organized under a law of 1901.<sup>52</sup> The case involved a civil action brought by an association of public school teachers against the Archbishop of Reims, for damages resulting from an episcopal letter accusing the public schools of offending the faith of their pupils. The action was rejected both on the ground that associations (as distinguished from unions) do not have the right to represent the collective interests of their trades or professions, and on the ground that the honor and integrity of a public function (education in the public schools) are concerns of the state as such, and not of any functionary. While this distinction between unions and other nonprofit associations has been criticized as arbitrary,<sup>53</sup> it appears to survive and forms part of the background against which the dialectic of restrictive case law and expansive legislation has unfolded.

It is clear, of course, that an association as such can be the victim of a crime—as when its treasurer embezzles its funds<sup>54</sup>—and that in such a case the association is a proper *partie civile*. Similarly, where landowners formed a hunting association and assigned to it, for the benefit of all members, hunting rights on their respective lands, the Criminal Chamber held that the association was a proper *partie civile* in a prosecution of a poacher on a particular member's land.<sup>55</sup>

When the individual interests of the group's members are involved, rather than the collective interest of the group as such, the Criminal Chamber has generally denied standing to the group. Two 1954 cases may serve as illustration, both involving books which defended the collaborationist regimes during the Nazi occupation. Bardèche's book blamed the execution and deportation of hostages on the Resistance and the Jews; he was charged by associations representing those groups with the crime of justifying murder, but the

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49. *Encyclopedie Dalloz*, Action Civile ¶ 295-6 (1974).

50. *Id.*

51. *Id.* ¶ 299.

52. *Chambres Réunies*, 15 June 1923, S. 1924.1.49 note Chavegrain, D.P. 1924.1.153 note Rolland.

53. See Solus et Perrot, *supra* n. 47 s. 251 (1960).

54. Bouzat et Pinatel ¶ 1009.

55. Cass. crim. 3 Jan. 1925, D.P. 1925.1.85.

Criminal Chamber found no direct and personal injury to the associations as such.<sup>56</sup> Rassinier's book claimed that tales of persecution were exaggerated for sympathy, and generally insulted the Resistance. In the action against him for defamation, the Criminal Chamber held that the National Federation of Deportees and Internees of the Resistance had not been attacked personally, and group defamation was not actionable.<sup>57</sup>

The lower courts, on the other hand, have occasionally resisted this approach. In Bardèche's case, on remand from the Court of Cassation, the Court of Appeal of Orleans awarded nominal damages to the Federation of Associations of Former Jewish Volunteers, because the book had attacked all French Jews as not true Frenchmen—therefore, of necessity all members of the Federation.<sup>58</sup> More recently and directly, the Court of Appeal of Colmar accorded *partie civile* status to a true public-service association called "Movement for Aid to all Distressed Persons," in an action against a mayor who directed town employees to burn the camp of impoverished gypsies about whom townspeople had complained. The Court emphasized precisely the fact that without the aid of such disinterested groups the victims would have had no access to the courts, since they had no money and the prosecutor had refused to take up their complaint.<sup>59</sup> The Assize Court of Paris has put the rationale most succinctly, in awarding nominal damages to the Association "Choisir" as *partie civile* in a prosecution for rape. The court found that the Association's purpose—to protect women in danger—was both distinct from that of the general public represented by the prosecutor, and dedicated to a fundamental ethical and social value worthy of legal protection; when the Association undertook, pursuant to that purpose, to defend a woman against sexual crime, it suffered a direct, personal, real and certain harm cognizable in the criminal courts.<sup>60</sup> Whether these lower courts can prevail against the Criminal Chamber's continuing hostility<sup>61</sup> must seem rather doubtful.

A similar ambivalence of the courts toward associations appears in the case of departmental federations of hunters and of fishermen, established pursuant to the Rural Code arts. 396 (hunters) and 407 (fishermen). The federations are given semipublic status—one must be a member of a departmental federation to get a hunting license, art. 396—and are charged with preventing poaching and improper fishing, creating and maintaining preserves, and protecting

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56. Cass. Crim. 11 Feb. 1954, 1954 *Rev. Trim.* 311 (No. 38), J.C.P. 1954.II.7994.

57. Cass. Crim. 16 Dec. 1954, D.S. 1955, 287.

58. C. Orleans 12 Nov. 1954, 1955 *Rev. Trim.* 112.

59. C. Colmar 10 Feb. 1977, D.S. 1977, 471, note D. Mayer.

60. Cour d'assizes Paris, 15 Dec. 1977, D.S. 1978, 61, note D. Mayer.

61. E.g., Cass. Crim. 10 Nov. 1976, J.C.P. 1977.II.18709.

and promoting reproduction of game and fish. While the lower courts have frequently permitted the federations to act as *parties civiles* for specific violations such as hunting without a permit or out of season or with illegal weapons, or pollution of rivers, or fishing with illegal tackle, etc., the criminal chamber of the Court of Cassation has usually denied such status unless the federation as such is directly affected, as by having to restock waters after a fish kill by pollution, or replenish game reduced by illegal activity.<sup>62</sup>

Where a number of persons not otherwise associated are injured by a violation, and they join together in an *action civile*, it appears that the joinder is permissible, though each probably must prove his own damage;<sup>63</sup> an association formed by them would be without standing as an association.<sup>64</sup>

ii) *Statutory Authorization.* While the debate in the courts and the literature over the association as *partie civile* continues,<sup>65</sup> the legislature appears to be persuaded of the value of private organizations as aides to law enforcement, and has included specific authorizations in a number of regulatory laws. Various formulas have been used, which attempt on the one hand to relax the requirement of directness of harm, and on the other hand to provide a means of qualifying the organization.

A 1955 regulation of taverns provides:

Anti-alcohol leagues recognized as serving the public interest [*reconnues d'utilité publique*] may exercise the rights accorded to the *partie civile* . . . . ., or resort if they prefer to the private action based on arts. 1382f. of the civil code concerning acts contrary to the provisions of this code.<sup>66</sup>

Under this provision the National Committee for Defense Against Alcoholism has been allowed to complain, for example, of a drunk driver who refused to give a blood sample, the damage being frustration of the Committee's need for statistics;<sup>67</sup> and of improper publicity for an aperitif in a Metro station, the damage being presumably

62. Bouzat et Pinatel ¶ 1014 (d); *Encyclopedie Dalloz*, Action Civile ¶ 328-335 (1974).

63. Cass. Crim. 13 June 1972, *Bull. Crim.* 1972 No. 197; Cass. Crim. Oct. 17, 1972, D.S. 1973 Somm. 61; *Encyclopedie Dalloz*, Action Civile ¶ 352.

64. Trib. corr. Seine, 19 Dec. 1957, D. 1958, 257.

65. Critical: e.g., Larguier, "L'Action Publique Menacée," D. 1958 Chron. 29; at least uneasy: Boulan, "Le Double Visage de l'Action Civile exercée devant la Jurisdiction Répressive," J.C.P. 1973.I.2563; positive: Audinet, "La Protection Judiciaire des Fins poursuivies par les Associations," 1955 *Rev. Trim.* 213; Vouin, "L'Unique Action Civile," D.S. 1973 Chron. 265; Durand, "Défense de l'Action Syndicale," D. 1960 Chron. 21; Mayer, notes, D.S. 1977, 472, and D.S. 1978, 61.

66. Decree of 8 Feb. 1955, art. 96, D. 1955 L. 96.

67. C. Paris 20 March 1961, D. 1961, 563; 24 March 1961; 12 Jan. 1962 D. 1962, 227.



the cost of additional countervailing advertising,<sup>68</sup> and of opening a tavern too close to a protected place<sup>69</sup>—all while reiterating the principle that the damage complained of must be distinct from that of the general public represented by the prosecutor.<sup>70</sup> The qualification of the association as one “recognized as serving the public interest,” which has been suggested as a suitable *general* test for associations in the *action civile*,<sup>71</sup> draws on the 1901 law dealing with the legal personality of nonprofit associations generally, which requires such recognition by executive decree in order for an association to qualify for receipt of donations.<sup>72</sup>

In 1956 the Family and Social Assistance Code was adopted, which in art. 3 para. 4 authorized the national and departmental unions of family associations to act as *partie civile* concerning acts affecting the moral and material interests of the family. A 1973 decision of the Court of Appeal of Paris held that the sections of the penal code dealing with the crime of offense against public morals in effect superimposed on that authorization the requirement that the unions obtain the imprimatur of the Secretary of State and the Ministers of Justice and Interior.<sup>73</sup> The legislature thereupon amended the Family Code provision to exempt the unions from that additional requirement,<sup>74</sup> and in 1976 a Paris trial court allowed the departmental union to litigate against producers of pornographic films.<sup>75</sup>

In 1972, a new art. 2-1 was added to the Code of Criminal Procedure authorizing associations formed to combat racism to act as *partie civile*, concentrating on the qualification issue and adopting the very liberal test of five years existence.<sup>76</sup>

A potentially more dramatic authorization was made in 1973 in the consumer field, as part of a law enacting, *inter alia*, prohibitions

68. Cass. Crim. 2 March 1960, D. 1960, 653.

69. Cass. Crim. 19 March 1975, D.S. 1975, Somm. 59; *Encyclopedie Dalloz*, *Action Civile* ¶¶ 314-7.

70. See Tunc, note on two decisions of the Court of Appeal of Paris, D. 1961, 563; note, 1967 *Rev. Trim.* 174-5.

71. Solus et Perrot, 1 *Droit Judiciaire Privé* 239 (1960).

72. Law of 1 July 1901, arts. 10-11, D. 1901.4.105. In general, the right to form associations without authorization or registration is established in art. 2 of the law, but registration is a prerequisite to the acquisition of separate legal personality, arts. 5 and 6. Recognition of serving the public interest is then a third step, usually requiring a substantial period of prior existence and activity, and providing not only the right to receive donations and larger subscriptions but also to acquire immovables. For a brief description see Amos & Walton, *Introduction to French Law* at 52-4 (3d ed. Lawson, Anton & Brown, 1967).

73. Cass. Crim. 10 July 1973, J.C.P. 1974.II.17728.

74. Law No. 75-269, 11 July 1975, D.S. 1975.L.278.

75. Trib.gr.inst. Paris, 8 Nov. 1976, D.S. 1977, 320.

76. Law No. 72-546, 1 July 1972: “Any association, duly registered at least five years before the act, which dedicates itself by its charter to fight racism, may exercise the rights accorded to the *partie civile* concerning violations of arts. 187-1 and 416 of the Penal Code.”

against various forms of price discrimination and deceptive advertising. Art. 46 of the rather vaguely titled "Law for the Guidance of Commerce and the Crafts" (commonly known as the *Loi Royer*) reads in part as follows:

. . . . . (D)uly registered associations whose explicit charter object is to defend the interests of consumers may, if they are approved for that purpose, bring private actions before any jurisdiction with respect to acts causing harm directly or indirectly to the collective interest of consumers.<sup>77</sup>

An implementing decree contemplated by the provision requires a showing of longevity, activity and representativeness, along with certification by the Attorney General of the Court of Appeal for the district in which the organization has its seat; the approval is issued by joint decision of the secretary of state [*garde des sceaux*] and the ministries of justice and of economics and finance.<sup>78</sup> While a comparatist has recently suggested that the *Loi Royer* remains in this respect unexploited,<sup>79</sup> it has in fact been applied in the courts. In 1974, the Court of Appeal of Paris allowed a national federation of consumer cooperatives, which had qualified under the 1973 law, to intervene on behalf of the defendant-appellant in a civil action against the author and publisher of a book which allegedly improperly criticized various medicinal products.<sup>80</sup>

In 1975, the legislature adopted the following provision regarding the *action civile* in prostitution cases:

Any association recognized as serving the public interest, having as a charter object the prevention of the white-slave traffic and social action in favor of persons in danger of prostitution or persons who have submitted to prostitution with a view toward helping them to renounce it, may bring a private action before any jurisdiction where such action may be brought, with respect to violations of the white slave provisions of the penal code as well as those directly or indirectly connected with white-slave traffic, which have prejudiced directly or indirectly the mission which it fulfills.<sup>81</sup>

77. Law No. 73-1193, 27 Dec. 1973, "d'orientation du commerce et de l'artisanat," art. 46, J.C.P. 1974.III.41167. The courts had previously denied the *action civile* in cases of improper pricing and sales practices, as affecting only the public interest, see Bouzat et Pinatel ¶ 1000 at pp. 941-2.

78. Decree No. 74-491, J.C.P. 1974.III. 41736. It has been held that a professional organization of electric appliance dealers is not a consumer organization qualified to complain of misleading advertising of such products: trib.gr.inst. Rouen 19 March 1976, D.S. 1976, 367.

79. Von Hippel, "Der Schutz des Verbrauchers vor Unlauteren Allgemeine Geschäftsbedingungen in den EG-Staaten," 41 *RabelsZ* 237, 249n. 34 (1977).

80. Cour Paris, 20 Dec. 1974, J.C.P. 1975.II.18056.

81. Law No. 75-229, April 1975, D.S. 1975, L.117. See Pradel, "Le Renforcement de la Lutte Contre le Proxenetisme," D.S. 1976, Chron. 31.

In the environmental area, three recent laws have authorized actions by associations: the Law Concerning Waste Disposal of 1975, art. 26, permits associations recognized as serving the public interest and principally devoted to environmental protection to act as *partie civile*;<sup>82</sup> the Law on Protection of Nature of 1976 accords standing as *partie civile* in art. 14 to associations for the protection of animals, and in art. 40 to environmental organizations approved by governmental authority;<sup>83</sup> the Law of 1976 reforming the Urban Code, art. 44, accords such standing to environmental associations which are either recognized as serving the public interests, or regularly established for three years and administratively authorized to act (*agrées*).<sup>84</sup> In each of these statutes, however, in contrast to the Loi Royer, the authorization is limited to specified violations defined in the particular law, attempts to enact a more general provision for the environmental area having failed.<sup>85</sup>

## 2) Civil Cases

a) *Joinder rules*. Under both the old law<sup>86</sup> and the New Code of Civil Procedure,<sup>87</sup> it appears that there are no significant barriers to the joinder in a single proceeding of many claims arising out of a single wrongful act. Under the New Code art. 367 the judge may order—on motion or *sua sponte*—consolidation of any cases before him, where a sufficient connection exists between them so that common investigation or adjudication is in the interest of justice. Under art. 101 a judge may transfer a case to another court if there is such a connection with another case pending before the transferee court. Under art. 332 the judge may ask the parties to join (“forced intervention”) any other persons interested whose presence he deems necessary to resolution of the controversy. Any person asserting a claim sufficiently connected with the original may intervene (art. 325).

On the other hand, true representation of one claimant by another, such as in our class action, is precluded or at least made very cumbersome by the doctrine of “*nul ne plaide par procureur*,” no

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82. Loi No. 75-633, 15 July 1975, D.S. 1975.L. 281.

83. Loi No. 76-629, 10 July 1976, D.S. 1976.L.308. It has been held that the privilege of art. 40 is limited to violations of the provisions there specified. Cass. Crim. 30 Nov. 1977, J.C.P. 1978.IV.33.

84. Loi No. 76-1285, 31 Dec. 1976, D.S. 1977.L.48. The procedure for obtaining authorization under these environmental laws is now governed by Decree No. 77-760, 7 July, 1977, D.S. 1977.L.308. For a discussion of the early experience, noting a rather astonishing number of associations seeking authorization, see Prieur, “L’agrément des associations de protection de la nature et de l’environnement,” D.S. 1978 Chron. 143.

85. See e.g., Delmas-Marty, note, J.C.P. 1977.II.18709.

86. See Herzog, *Civil Procedure in France* § 7.14 (1967).

87. Supra n. 15.

one may sue by attorney. Short of a flat assignment of claims,<sup>88</sup> this rule means that each party must be named in and served with all pleadings and orders in the case, even if he has given a formal power of attorney to another to act on his behalf.<sup>89</sup>

b) *Scope of judgment.* An interested person who is not joined in the original suit is normally not entitled to the benefit of a favorable judgment in that suit, in any subsequent separate action against the common defendant.<sup>90</sup> Thus the procedural economy of issue preclusion, increasingly available to third persons in the U.S. as the principle of mutuality of estoppel is being abandoned,<sup>91</sup> is not available in France. In each separate action based on the same wrongful conduct, therefore, the claimant must offer separate proof of the wrong.

c) *Role of associations.* It appears that in theory the same principle applies to associations in purely civil actions as in the *action civile*: i.e., the association may sue for injury suffered by its members if the injury reaches every member personally.<sup>92</sup> But as already noted, the civil courts—though apparently much less frequently called upon to decide group claims—have shown a greater readiness than the criminal courts to find such injury by virtue of collective interest.<sup>93</sup>

#### B) *Standing of Groups in Administrative Courts*

The law of standing in administrative courts is still based on the case law of the Conseil d'Etat, assisted only by occasional legislation.<sup>94</sup> In general, the Conseil d'Etat has been liberal in according standing to groups or associations by finding a collective interest, but it has stopped short of purely individual interests of particular members.

Where the administrative decision is in the form of a rule, or otherwise of general application, the Conseil d'Etat has never required that an association or union seeking review for lack of authority (*excès de pouvoir*) show that every member of the group is

88. This brings its own difficulties: while the claim is normally assignable (Civ. C. art. 1689), the obligor may obtain release by paying the assignee the consideration paid for the assignment (art. 1699).

89. Herzog, *Civil Procedure in France* 249-50 (1967); Vincent, *Précis de Procédure Civile* ¶ 372 (6th ed. 1973).

90. See Herzog, *supra* n. 89 at 553.

91. See, e.g., American Law Institute, *Restatement of the Law, Second (Judgments)*, Tentative Draft No. 3 § 88 (1976), and references in the Reporter's Note at 170f.

92. See text *supra*, at n. 56-58; Solus et Perrot, 1 *Droit Judiciaire Privé* 237 (1960).

93. *Supra* n. 47.

94. E.g., Ord. 4 February 1959.L.304, art. 14 permitting civil servants to unionize and to bring action in administrative courts to protect their collective interests.

affected,<sup>95</sup> although it may find in an unsympathetic case that the group's own internal authority to act does not extend to the special interests of some segment of the members.<sup>96</sup> In a classic case, the Conseil allowed an association of property owners and taxpayers in a city sector, formed after the streetcar company had discontinued a route serving the area, to litigate the refusal of municipal authorities to order resumption of the line.<sup>97</sup>

On the other hand, where the decision of which the group complains is individual in form, the Conseil has been seen to distinguish between those which go against an individual (e.g., denying promotion, imposing discipline) and those which favor the individual (e.g., granting promotion). A group of persons including the affected individual is collectively affected in the latter case, in so far as promotion granted to the individual is denied to others in the group; but the former case is said not to affect the collective interest merely by harming the individual.<sup>98</sup> While this line of cases has been criticized<sup>99</sup>, its vitality appears not to be doubted. It is tempered, however, by the Conseil's willingness to allow the group to intervene in support of the prejudiced individual's own complaint,<sup>100</sup> and also perhaps by the presumed (but probably not much used) right of the group to act in the name of a wronged member on the basis of a special mandate from the latter.<sup>101</sup>

### C) Conclusion

Group action in France—whether in the criminal, civil or administrative courts—can be seen to perform functions analogous to but clearly not identical with those of the American class action. In particular it permits representation of the collective interest of the group, and may facilitate utilization of liberal joinder rules by individual members with distinguishable interests. There appear to be no legal inhibitions against the group's inviting individuals to join, comparable to our threats of disciplinary action against lawyers for solicitation of business, though the absence of discussion of the problem may simply indicate that such conduct has not occurred. Presumably the prosecutor himself, in the criminal case, could properly contact persons believed to have private claims resulting from

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95. See de Soto, "L'Individualisme dans la Jurisprudence du Conseil d'Etat," in 2 *Mélanges Offertes à Marcel Waline* 759, 772 (1974).

96. *Id.* at 772-3.

97. C.E. 21 Dec. 1906, S. 1907.3.33, D. 1907.3.41.

98. Long, Weil & Braibant, *Les Grands Arrêts de la Jurisprudence Administrative* 72 (5.ed.1969); de Soto, *supra* n. 95 at 774.

99. See authors cited *supra* n. 98.

100. Long, Weil and Brabant at 72, citing C.E. 21 May 1953, Rec. 241.

101. C.E. 28 Dec. 1906, S. 1907.3.23, concl. Romieu.

the crime.<sup>102</sup>

It is clear, however, that the device is useful for the representation of collective interests as affected by individual injury, principally where the legislature has made the substantive policy determination that an act should be punishable and that associations should be enlisted in the enforcement machinery. So long as the *action civile* remains a favored vehicle for other procedural reasons, the opposition of the Criminal Chamber of the Court of Cassation is likely to frustrate efforts toward judicial generalization of the representative action.

The most obvious limitation of the French group action, even where it is authorized by statute, is that the individual cannot take the initiative in bringing the group's resources into the litigation. The group must be a pre-existing one, and it must decide, on the basis of consensually established authority, to act on behalf of its members; the individual can neither force the association to act against its will nor personally assume the representative role. Moreover, it appears that the association itself would not be entitled to recover damages suffered by individuals as such, distinct from those of the group collectively, without a formal assignment of claim.

#### IV. GERMANY

##### A) *Mass Claims*

##### 1) *Private Claims in Criminal Cases*

The German Code of Criminal Procedure (StPO) contemplates three forms of intervention by persons injured by a violation of penal law: (a) the private complaint (*Privatklage*), §§ 374f., in which the victim takes the initiative in instituting prosecution; (b) the subsidiary complaint (*Nebenklage*), §§ 395f., in which the victim joins in a prosecution already begun by the public prosecutor; and (c) the private claim for compensation (*Adhäsionsprozess*), §§ 403f., in which the victim (whether or not he joins the prosecution as *Privat-* or *Nebenkläger*) asserts a claim, subsidiary to the public prosecution, for compensation or other relief for injury suffered by reason of any violation.

(a) *Privat-and Nebenklage.* § 374 lists a number of crimes for which the private action is permissible, without first filing a complaint with the public prosecutor. Those listed are minor crimes (*Vergehen*), most of which can be prosecuted only on complaint of the victim anyway.<sup>103</sup> Costs are handled as in civil proceedings

102. Such, at any rate, is the assumption by Sloan, "Games French People Play with Class Actions or French Games with Class," 45 *Temple L.Q.* 210, 226 (1972).

103. See Kern-Roxin, *Strafverfahrensrecht* § 64(B) (9th ed. 1969).

(§ 379a), which means that the private prosecutor must put up an advance cost reserve; the court can dismiss the action at any time when it appears that the defendant's fault was minor (§ 383), in which case (as well as that of acquittal) the private prosecutor bears the defendant's costs (§ 471); and in most cases a formal attempt at conciliation must be made before the action can be brought (§ 380). As a result of these restrictions, the *Privatklage* is not much used,<sup>104</sup> and at least one empirical study has shown that the courts do as much as they can to discourage those that are brought.<sup>105</sup>

The *Nebenklage* is available not only where a *Privatklage* would be, but also where a victim has successfully petitioned the court to require the prosecutor to prosecute (*Klageerzwingungsverfahren*, § 170), as well as to the surviving kin in the case of a punishable homicide. Since the prosecutor has by definition already begun the main proceeding, the *Nebenkläger* is not required to put up security for costs, nor will there be liability for costs.

(b) *Adhäsionsprozess*. The claim for compensatory damages subsidiary to a criminal action is available to the victim of *any* crime (§ 403), but a number of features distinguish it from its French counterpart.<sup>106</sup> First, only material interests can be protected (*vermögensrechtlicher Anspruch*). Second, no decision is made on the claim if the defendant is not convicted of any crime (§ 405). Third, the court can refuse to decide the private claim if it would unduly delay the criminal proceeding (§ 405)—a circumstance which is not at all unlikely in view of the relatively quick progress of most criminal cases.<sup>107</sup>

On the other hand, the German statute expressly requires that the victim be notified of the criminal proceeding (§ 403 para. 1.), which presumably would include all identifiable victims of an offense. While it is generally said that the *Adhäsionsprozess* is not much used because of these restrictions,<sup>108</sup> it was the vehicle for one of the most notable mass claims in recent years, the Thalidomide case.<sup>109</sup>

104. Id. § 64 (A)(3).

105. Koewius, *Die Rechtswirklichkeit der Privatklage* (1974).

106. See the comparison by Jolowicz, *supra* n. 8.

107. Kern-Roxin, *supra* n. 103 at §§ 66(A).

108. See Amelunxen, "Die Entschädigung eines durch eine Straftat Verletzten," *ZgSW* 86, 457 (1974). Langbein asserts, apparently on the basis of recent interviews with judges and prosecutors, that the device is so little used that no attempt is made any longer to notify potential claimants. Langbein, *Comparative Criminal Procedure: Germany* 114 (1977).

109. The case was the longest criminal case in German history. The investigatory stage began in 1962, and the trial itself lasted 2 1/2 years (1968-71). The decision of the criminal court in Aachen, terminating the criminal proceeding on the basis of a finding of "minor fault" and taking into account the effect on the defendants of the lengthy proceedings, is found in 1971 *JZ* 507.

Some time after a German physician reported findings in 1961 which linked thalidomide with birth deformities, a criminal action was begun against responsible officers of the manufacturer of the drug, which was marketed in Germany under the brand name Contergan. A substantial number of the estimated 2,500 children who were born victims of the drug joined the proceedings as *Nebenkläger*.<sup>110</sup> In 1970, the officers and the manufacturer reached a settlement with the *Nebenkläger*<sup>111</sup> with respect to their damage claims, pursuant to which a trust fund of 100 mill. DM was established by the company. The settlement called for a complicated process in three steps: (1) claims asserted by children and parents would be screened by a medical panel for causal relationship; (2) the committee of trustees would approve claimants for participation in the fund; and (3) a second committee of experts would determine how to distribute the fund, evaluating claims on the basis of a pain-and-suffering measure of damages. A claimant would then sign a release from further liability before receiving payment of the amounts specified.<sup>112</sup> It appears that the benefits of the settlement were open to children not formally joined as *Nebenkläger*, and most (but not all) potential claimants did agree to the arrangement.

In late 1971, responding to political pressure, to the argument that inadequate pharmaceutical laws were a major factor in the disaster, and to the complaint that the settlement was inadequate, the federal legislature enacted a law creating a Foundation for the Assistance of Handicapped Children,<sup>113</sup> one of the purposes of which was to take over the function of distributing compensation to the thalidomide victims. The law required the 100 mill. to be paid over to the Foundation and called for an additional appropriation of 100 mill. DM, half of which was to be added to the settlement amount exclusively for the thalidomide children.<sup>114</sup> Eligible children (not limited to those who signed the settlement) would receive a combination of lump-sum payments and annuities to be measured with specific limits by the severity of the deformity and the accompanying functional disability.<sup>115</sup> Upon establishment of the fund all claims from the settlement were to become moot

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110. The charges included not only deliberate violation of the Pharmaceuticals Law, but also aggravated battery, thus allowing *Nebenklage*: 1971 JZ 507.

111. The settlement is set forth in part in Zeschwitz, "Zum Gesetz Hilfswerk für behinderte Kinder," 1972 *FamRZ*, 476 at 477. The difficulties attendant on dismissing a prosecution conditioned on settlement of private claims, among other procedural problems in the case, are discussed in Bruns, "Ungeklärte Verfahrensrechtliche Fragen des Contergan-Prozesses," in Zipf & Schroeder, *Festschrift für Maurach* 469 (1972). See also Schultz, 1971 *MDR* 191.

112. Settlement agreement art. 7, Zeschwitz, *id.* at 477.

113. Bundesgesetzblatt (BGBl) 1971, Teil I, S. 2018. See the discussion in Zeschwitz, *supra* n. 111.

114. Foundation law § 12.

115. *Id.* § 14.



(*gegenstandslos*).<sup>116</sup>

Certain beneficiaries of the settlement then sued the three members of the trustee committee for a declaration that they were obligated to pay the plaintiffs those amounts fixed pursuant to the settlement out of the funds in their hands. The plaintiffs argued that they might well be worse off under the Foundation than under the settlement, and that the law establishing the Foundation constituted an improper expropriation. In addition, the company sued the trustees to require payment to the Foundation.<sup>117</sup> In separate opinions both the Federal Supreme Court (*Bundesgerichtshof*)<sup>118</sup> and the Federal Constitutional Court (*Bundesverfassungsgericht*)<sup>119</sup> have now upheld the statute against this challenge. Since the purpose of the statute was to improve the situation of the Thalidomide children, by adding more funds and by assuring a more reliable and uniform distribution of the funds, as well as providing a permanent institution for the assistance of all handicapped children, there was no improper expropriation.<sup>120</sup>

The case is interesting because of its many procedural aspects, which come very close to the treatment that would be accorded an American class action of similar scope. An action is begun by the prosecutor, possibly on complaint of one or more of the injured persons, the latter probably with the assistance of a group called the Organization of Parents of Children Injured by Contergan.<sup>121</sup> Each victim of the alleged crime is notified of the existence of the criminal proceeding, and in effect invited to join. At least during settlement negotiations, the claimants are represented by a single person who eventually becomes one of the trustees. A settlement is reached on behalf of all claimants, and each is invited to participate in the settlement. The statute which supersedes the settlement is motivated by concern that all affected children be compensated, even if they were unwilling to litigate or were put off by the terms of the settlement.<sup>122</sup> It is not a typical case for Germany, to be sure,<sup>123</sup> but then neither were class actions like *Eisen v. Carlisle & Jacquelin*<sup>124</sup> which have made so much law for the United States.

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116. Id. § 23(2).

117. See Böhm, "Zum Gesetz über die Errichtung einer Stiftung 'Hilfswerk für behinderte Kinder'," 1974 *NJW* 842.

118. BGHZ 64, 30 (1975); 1975 *NJW* 1457.

119. 1976 *NJW* 1783.

120. This conclusion is strongly criticized by de Lazzer, "Ad-hoc-Dogmatismen: zum Contergan-Urteil des Bundesverfassungsgerichts," 1977 *JZ* 78.

121. See Böhm, *supra* n. 117 at 843.

122. The new Federal Pharmaceuticals Law of 1976 imposes strict liability under certain conditions, which would quite probably obviate future resort to the criminal process. See Kloesel, "Das Neue Arzneimittelrecht," 1976 *NJW* 1769.

123. See n. 111 *supra*.

124. 417 U.S. 156 (1974), with further references.

## 2) *Civil Cases*

a) *Joinder rules.* The German Code of Civil Procedure (ZPO) contains in §§ 59-63 a set of rules for joinder of claims very similar to our federal rules. Multiple parties can join their claims in a single action if they have a joint interest in the subject matter of the lawsuit or if their claims are based on the same factual and legal grounds (§ 59), indeed also if their claims are similar and based on essentially similar factual and legal grounds (§ 60). This latter provision is said to be based on judicial economy and convenience, and therefore to be liberally interpreted.<sup>125</sup>

Official representation of one party by another, as in France, is excluded (§ 63),<sup>126</sup> with a single exception: where the joinder of claims is "necessary," a co-party who has been notified of a hearing and fails to appear is represented, for purposes of that hearing, by the co-parties who do appear (§ 62).<sup>127</sup> It would seem that the obligation to notify every co-party would apply even if all employ the same attorney, so that at least that degree of paperwork and costs could not be saved.

b) *Scope of judgment.* As in France, a judgment is binding only as between the parties, and a third person may not take formal advantage of favorable judgments to which he was not a party. The principle is embodied in art. 325 of the Code of Civil Procedure.

c) *Role of associations: in general.* The right of an association to litigate the claims of its members in its own name has been recognized in Germany, but with two basic requirements: (i) there must be a contractual authorization, which may be inferred from the appropriate language in the association's charter; and (ii) the association must have an interest of its own in pursuing the claims.<sup>128</sup> Thus, in one decision the *Bundesgerichtshof* held that an association of brewers could sue an antique dealer to recover beer flasks belonging to its members, but that it could not exercise in its own name a power of attorney given by other associations to recover flasks belonging to *their* members, the plaintiff having no interest of its own in property belonging to non-members.<sup>129</sup> Such a power of representation, of course, does not absolve the plaintiff from having to prove the individual claims it purports to pursue, to the extent

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125. See Baumbach-Lauterbach-Albers-Hartmann, *Zivilprozessordnung* § 60 Anm. 1. (32d ed. 1974).

126. "The right to prosecute the action belongs to each co-party; all co-parties must be notified of every hearing."

127. See Baumbach-Lauterbach, *Zivilprozessordnung* § 62 Anm. 4(B) (30th ed. 1970).

128. Rosenberg-Schwab, *Zivilprozessrecht* § 46.III.1 (10th ed. 1969); Kötz, *supra* n. 26 at 90-91.

129. BGH Oct. 5, 1955; 1956 ZZZ 69, 30.

that individual relief is sought.<sup>130</sup> If such an action results in judgment, it will bind the individual member.<sup>131</sup>

c) *Statutory authorization.* In a few areas the German legislature has given associations the right to sue in their own names without specific or general authorization from individual members, but recent efforts to extend the right more generally to the consumer and environmental fields have been largely unsuccessful.

The most prominent *Verbandsklage* is found in § 13 of the Law Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* (UWG)). The section distinguishes between associations protecting professional or business interests and those protecting consumer interests, with respect to the specific prohibited practices which can be sued upon, and it is specifically limited to prohibitory relief. For example, a business group can sue to enjoin commercial bribery (§ 12), while a consumer group cannot; consumer groups can sue to enjoin practices against good morals (§ 1) only if these involve false or misleading information with respect to goods or services touching the essential interests of consumers; consumer groups can sue to enjoin close-out sales not involving an entire business, branch, or product line (§ 7 (1)), while business groups cannot.<sup>132</sup>

Another such provision is § 35 of the Law Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (GWB)). While the first paragraph gives a private claim for damages to persons whom the violated norm was intended to protect, the *Verbandsklage* in the second paragraph is limited to prohibitory relief, and only to business groups. There is considerable debate over whether consumers are within the scope of interests intended to be protected by the cartel law, but it appears to be the prevailing view that they are not,<sup>133</sup> so that even a purely representative role for consumer associations would be excluded.

Most recently the *Verbandsklage* has been introduced into the 1976 Law on General Terms and Conditions.<sup>134</sup> The statute makes a number of specified standardized clauses either presumptively or absolutely void, and in § 13(2) provides for an action to prohibit the use of invalid clauses, which action may be brought only by consumer associations, trade associations, or chambers of industry and

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130. See e.g., Bettermann, "Zur Verbandsklage," 1972 ZZZ 85, 133 at 134.

131. Rosenberg-Schwab, supra n. 128 § 46.V.4.

132. On the availability of an individual claim of the consumer for violation of the UWG, see Schricker, "Soll der einzelne Verbraucher ein Recht zur Klage wegen unlauteren Wettbewerbs erhalten?", 1975 ZRP 189.

133. Goll, "Verbraucherschutz im Kartellrecht," 1976 GRUR 486, esp. 492; Kötz, supra n. 26 at 89.

134. AGB Gesetz: transl. 26 Am. J. Comp. L. 568, with article by Sandrock, "The Standard Terms Act 1976 of West Germany," id. at 551.

commerce. Moreover, § 21 permits anyone, apparently not limited to members of the complaining group, to invoke a prohibitory judgment so as to invalidate clauses covered by the judgment. This constitutes an unprecedented departure from the normal rule.<sup>135</sup> At least one writer has seen (but not discussed) possible constitutional difficulties with § 21.<sup>136</sup>

While there have been arguments for generalizing the *Verbandsklage* by analogy from the specific statutory authorization,<sup>137</sup> there is wide agreement that a statutory provision is essential.<sup>138</sup> Recent attempts to introduce the *Verbandsklage* into the Federal Pollution Law<sup>139</sup> and the Federal Law for the Protection of Nature<sup>140</sup> have so far been unsuccessful. For the most part, therefore, the role of groups and associations in the protection of their members remains an auxiliary one, that of providing information, expert assistance and perhaps also financial assistance to members litigating in their individual capacity.<sup>141</sup>

### B) *Standing of Associations Before Administrative Courts*

In contrast to the U.S. and France, Germany has maintained a restrictive policy toward standing to sue in the administrative courts.<sup>142</sup> The question is governed by § 42 (II) of the Administrative Courts Law, which requires that a claimant be injured by an administrative act in his own right (*in seinen Rechten*), and the courts have interpreted this provision as excluding associations from litigating on the basis of injury to their members, not to mention litigating in the public interest.<sup>143</sup>

135. See IV(2)(b) above, and e.g., Rosenberg-Schwab, *Zivilprozessrecht* § 157 (10th. ed. 1969).

136. Müller-Graaf, "Das Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen," 1977 *JZ* 245 at 245f.

137. Wolf, *Die Klagebefugnis der Verbände* (1971), reviewed by Bettermann, n. 130 supra.

138. E.g., Bettermann, n. 130 supra.

139. Bundesgesetzblatt (BGBl) 1974.I.721. See e.g., Reh binder, "Argumente für die Verbandsklage im Umweltrecht," 1976 *ZRP* 157; Redeker, "Verfahrensrechtliche Bedenken gegen die Verbandsklage," 1976 *ZRP* 163; Rupp, "Popularklage im Umweltschutzrecht?," 1972 *ZRP* 32.

140. BGBl 1976.I.3574. See Reh binder, supra n. 139; Müller, "Das Neue Bundesnaturschutzgesetz," 1977 *NJW* 925 (930).

141. See the discussion of this role in Kötz, supra n. 26 at 90 f.

142. On the other hand there is liberal provision for standing to be heard in the administrative process itself: Reh binder, "Controlling the Environmental Deficit: West Germany," 24 *Am. J. Comp. L.* 373, 376-7 (1976). The new Administrative Procedure Law (*Verwaltungsverfahrensgesetz*, *VwVfG* 1976), contains a broad provision in § 13(2) allowing the administrator to join as party anyone whose legal interests are affected (*diejenigen, deren rechtlichen Interessen . . . berührt werden*). Indeed the law also provides that where more than 50 persons join in the same petition, the court may require designation of a representative from among the group, and absent such designation may then appoint the representative itself (§ 17).

143. See Reh binder, supra n. 142 at 380.

For individual standing, the administrative courts have also followed a rather restrictive policy, insisting not only that the plaintiff be injured by an administrative act, but also that the act be in violation of a norm intended for his protection (*Schutznormtheorie*).<sup>144</sup>

Where a large number of individuals can meet standing requirements regarding a single administrative act, on the other hand, § 64 of the Administrative Courts Law incorporates by reference the joinder rules of the Code of Civil Procedure<sup>145</sup> so that it is possible to join them all as co-parties and by agreement to establish a single representative for purposes of the litigation.

### CONCLUSION

The class action, American style, is in the strictest sense unknown in France and Germany, because neither recognizes the right of one member of a group of persons to sue for all without the prior consent of each. Many of the conditions for the rise of the class action for damages in the U.S.—the contingent fee, the responsibility of the winning party to bear his own attorney's fees—do not exist in those countries, and it is at least somewhat more feasible there for a person with a small claim to sue individually. This is especially so in France, where the claimant may piggy-back his claim on the criminal process wherever any sort of criminal penalty is provided by law, and yet escape cost consequences as loser in many instances. Further it appears that many of the purely procedural economies claimed for the class action can be achieved in French and German courts—albeit through a more laborious consensual process.

Nonetheless, group action is increasingly important in the form of litigation by pre-formed associations of persons of like interest—aptly termed “intermediate societies” by Cappelletti<sup>146</sup>—and considerable pressure is being brought to bear on the legislatures to expand their role. It already appears that a substantial number of such associations has arisen in both France and Germany, now active in assisting their members extra-judicially, and ready to go to court when the law permits. In view of our own arguments over the desirability of class actions—the self-appointed character of the representative, the unseemly entrepreneurial role of the lawyer—and of the effect of a number of recent restrictive decisions in the trend-setting federal system, it seems likely that the role of pre-formed groups in providing legal assistance to their members will be the wave of the future in the U.S. as well. Indeed, to the extent that the

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144. Rehinder, *id.* at 378; Martens, *Die Praxis des Verwaltungsprozesses* § 5 (1975); Martens, “Einführung in die Praxis des Verwaltungsprozesses,” part II, 1973 *JuS* 425, 426f.

145. See text *supra* at n. 125-128.

146. Cappelletti, *supra* n. 5 at 678f.

chief hope for the class action is not purely procedural economy but equalization of resources for expensive litigation, extra-judicial formation of "intermediate societies" is a far more logical and promising solution. In this we could do worse than to examine the European models.

A couple of points suggest themselves in this preliminary look at France and Germany. First, with the exception of the rather unique *Thalidomide Children's Case* in Germany, group action does not appear to have been a fruitful vehicle for large money damage awards. Even where, as in France, a group is permitted to claim damages for collective injury, the amounts recovered have usually been small or even nominal (*un franc de dommage-intérêts*) and the main purpose of the action has been to ensure enforcement of the law. The majority of statutes authorizing the group action in France has involved intangible interests such as public morals, racism, prostitution, or highly diffuse interests such as urban planning and the environment. In Germany the few instances of authorized *Verbandsklage* contemplate only prohibitory relief. In general, the role of the damages award as a deterrent to wrong-doing is not nearly so highly prized in France and Germany as in the U.S.

Second, and perhaps just as notable from our point of view, both European countries have considered the need, in authorizing group action, to include some mechanism for screening the groups themselves, with a view to ensuring at least minimal commitment to their stated purposes and capacity to fulfil that commitment. The French requirements—recognition as serving the public interest, length of existence, or governmental approval—appear to vary in inverse relation to the perceived need for encouragement, perhaps directly with the likelihood of proliferation of organizations in the field. This question of the practical capacity of the group or class representative to pursue litigation effectively has been a vital one for us as well, but we have generally left that to the courts for *ad hoc* decision. Whether we would find legislative or bureaucratic regulation palatable is very much open to doubt.

